January 22, 1999

In the Matter of:		
Philip A. Chiaradio Claimant		
v.		
	Case No.	1998-LHC-2202
Electric Boat Corporation Employer/Self-Insurer		
	OWCP No.	1-139562
and		
Director, Office of Workers' Compensation Programs, United States Department of Labor Party-in-Interest		

Appearances:

Nathan Julian Shafner, Esq.
For the Claimant

Lance G. Proctor, Esq.
Lawrence McLaughlin, Esq.
For the Employer/Self-Insurer

Merle D. Hyman, Esq.
Senior Trial Attorney
For the Director

Before: **DAVID W. DI NARDI**
Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This is a claim for worker's compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended (33 U.S.C. §901, **et seq.**), herein referred to as the "Act." The hearing was held on December 4, 1998 in New London, Connecticut at which time all parties were given the opportunity to present evidence and oral arguments. Post-hearing briefs were not requested herein. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit, DX for a Director's exhibit and RX for an Employer's exhibit. This

decision is being rendered after having given full consideration to the entire record, which was closed on December 29, 1998 upon filing of the official hearing transcript.

Stipulations and Issues

The parties stipulate, and I find:

1. The Act applies to this proceeding.

2. Claimant and the Employer were in an employee-employer relationship at the relevant times.

3. On or before June 16, 1996, Claimant suffered an injury in the course and scope of his employment.

4. Claimant gave the Employer notice of the injury in a timely manner.

5. Claimant filed a timely claim for compensation and the Employer filed a timely notice of controversion.

6. The parties attended an informal conference on December 17, 1997.

7. The applicable average weekly wage is $785.68.

8. The Employer voluntarily and without an award has paid permanent total compensation from June 19, 1996 through the present and continuing, including the appropriate COLAs, for a total of $63,355.21, as of November 24, 1998.

The unresolved issues in this proceeding are:

1. The nature and extent of Claimant’s disability.

2. The date of his maximum medical improvement.

3. The applicability of Section 8(f) of the Act.

Summary of the Evidence

Philip A. Chiaradio (“Claimant” herein), fifty-seven (57) years of age, with a high school education and an employment history of manual labor began working on December 27, 1976 as a pre-heating electrician at the Groton, Connecticut shipyard of the Electric Boat Company (“Employer”), then a division of the General Dynamics Corporation, a maritime facility adjacent to the navigable waters of the Thames River where the Employer builds, repairs and overhauls submarines. As a pre-heat electrician Claimant had

duties of “heat(ing) up different sections of the hull section weld area joints which would enable the welders to weld the joints,” Claimant remarking further, “We installed the heat. We maintained the heat. We removed the heat. And we repaired our own equipment. While he worked primarily on the boats, he also worked throughout the shipyard and in the various shops and buildings as needed. While at the shipyard he also worked part-time helping out a cousin doing masonry work and he was able to continue this work until he had a stroke in 1990. He once injured his back in 1980 while loading some sand and he was treated by David Siciliano, D.C., for about a week or so with ultrasound and deep heat. Dr. Siciliano also referred Claimant to Dr. Will (?) in 1987 for further evaluation of his lumbar problems. Claimant’s back has never been the same since that 1980 injury and he has had his “good days and bad days,” depending upon the level of physical exertion.” (RX 25 at 3-15)

Claimant has had a number of injuries at the shipyard but managed to continue working on the boats until 1992, at which time he was placed on restricted duty and taken off the boats. He often had to work in tight and confined areas and sometimes he had to crawl into tight spaces, between pipes and similar spots. He would occasionally experience low back pain and he would report the symptoms at the Employer’s Yard Hospital where ice packs were applied and he would be told to return to work on light duty or sent to his own physician, if needed. Dr. Albert Laurenzo, Claimant’s family physician, treated Claimant’s stroke, had him hospitalized for eight or nine days and placed on blood thinners for about six months. He still takes one aspirin each day to keep the blood thin. Claimant had stomach surgery for an ulcer in 1984 and 1985, as a result of which portions of his stomach were removed, Claimant remarking “the ulcer was the size of a grapefruit.” The surgeries were performed by Dr. Monte Morano. As noted, Claimant injured his back on March 31, 1980 (RX 22), as well as on April 24, 1991 (RX 23) (his right leg and hip area) and each time he went to see Dr. Siciliano, either the father or his son, both of whom have treated Claimant over the years. Claimant described those injuries and the effects they had upon his ability to work at the shipyard up to the time he could no longer work on the boats and he was restricted to much easier work in the shops. (RX 25 at 16-24)

Claimant has undergone a number of epidural injections in his back and these have provided some relief. Claimant’s repetitive work activities after his return to work after his injuries have further aggravated his low back pain radiating down both legs, but worse on the left side. He has been to pain management and physical therapy in an attempt to teach him how to live with his symptoms but he finally reached a point on June 16, 1996, at which time he had to stop working because of the cumulative effect of his

multiple medical problems. He has not worked since then and he leads a mostly sedentary life as any physical exertion aggravates his lumbar disc syndrome. He has also been treated by Dr. Carlo Brogna and finally the pain became so severe that he underwent back surgery on March 23, 1994. The surgery provided little relief and he returned to work on November 21, 1994 still in pain. (RX 24-48)

Claimant's voluminous medical records for his multiple medical problems are best summarized by the July 16, 1996 report of Dr. Glenn Dubler wherein the doctor states (RX 18):

"The patient is a 54-year-old man who has been employed at the General Dynamics Electric Boat facility for 19-1/2 years. He is a pre-heating electrician. This involves the set-up and maintenance as well as repair and disassembly of heater apparatus that is used to heat up the hole (SIC) sections in preparation for welding of the plates together in formation of the submarine sections and subsections. The work involves heavy lifting, moving very heavy electrical cables, and putting in strip heaters, etc.

"HISTORY: The patient states that he was hurt on the job on October 8, 1992, when he was moving heavy electrical cable into a storage area manually. The patient had the acute onset of low back pain with radiation in a sciatic distribution down the left lower extension to the ankle and toes. The patient reported his injury to his supervisor and was seen in the yard hospital for evaluation. He stayed on the job for two and a half or three months with ongoing complaints of low back pain and left leg pain and left leg giving way.

"He then sought the attention of a chiropractor, Dr. Sisliano (SIC). An MRI was obtained and a disc herniation was diagnosed. The patient was referred to Dr. Brogna. Electrodiagnostic studies and a CT scan were obtained as well as a myelogram. The patient then sought the attention of several different neurosurgeons. He saw Dr. Sculco, Dr. Knuckey, and Dr. Olin. The patient decided to proceed with surgery under the care of Dr. Olin and on March 23, 1994, underwent lumbar disc surgery at the Miriam Hospital with excision of the L5-S1 disc on the left.

"Post-operatively, the patient was in physical therapy at Westerly Hospital for about eight months. His post-operative course was marked by improvement of his pre-operative symptoms. He had improvement in his back and leg pain, but he did have persistent pain in both areas.

"The patient states that he asked to return to work and did so at his regular job full time on November 15, 1994. He remained on the job in his regular capacity through June 18, 1996. The patient states that he has recently developed increasing pain in the low

back and radiating into the low back and radiating into the left lower extremity without any new injury.

"The patient went back and saw Dr. Olin who advised him to stay out of work and scheduled him for a myelogram. He is booked to have a myelogram at the Landmark Medical Center on July 23, 1996, and has not been working, pending the myelogram. In addition, the patient has undergone additional neurodiagnostic testing with electrical nerve conduction studies and electromyelogram.

"Current symptoms: Current complaints are of left-sided low back pain radiating in a sciatic distribution to the left foot. The patient states that his symptoms are aggravated by activity. He is also having difficulty sleeping. Lifting or carrying causes increased pain.

"Current medications: Vicodin, Naprosyn, Soma, and Trazodone . . .

"Review of records: MRI of May 6, 1996, shows scar tissue formation around the left S1 root and post-operative changes at the L5-S1 level.

All medical records that have been presented are reviewed in their entirety. This includes multiple entries. Treatment notes from Dr. Olin of May 29, 1996, and June 7, 1996, and June 7, 1996, electrical nerve conduction studies from Vladid Zayas are reviewed. Operative note of November 1, 1995, from Lawrence & Memorial Hospital for lumbar epidural steroid injection and from November 29, 1995, for L5-S1 facet block as well as the November 15, 1995, facet injection record from Dr. Hargus are reviewed. Notes from Dr. Brogna of multiple dates are reviewed. The evaluation of June 1, 1994, from Dr. Willetts has been reviewed. Multiple notes from Dr. Brogna in 1994 and from Dr. Olin of multiple dates are also reviewed. The discharge summary for the admission of March 23, 1994, through March 25, 1994, from the Miriam Hospital and the operative note of March 23, 1994, are reviewed. Operation was left L5-S1 hemilaminectomy, foraminotomy and discectomy.

"DIAGNOSES:

1. Status post lumbar laminectomy and excision of herniated nucleus pulposus left L5-S1.

2. Peri-radicular scarring S1 left with recurrent left S1 radiculopathy.

"CAUSATION: Causation of diagnoses #1 and #2 are attributed by patient history to his occupational injury of October 8, 1992.

"RESPONSE TO QUESTIONS: In response to your specific questions, the patient at this time is partially disabled, in my opinion, on a permanent basis.

Additional treatment will be dictated by the diagnostic studies including the myelogram that is scheduled. Treatment has been in keeping with the compensation protocols. Treatment has been reasonable and necessary. This patient has not at this point achieved maximum medical improvement because additional surgical treatment is being considered.

It is my opinion that the patient is not at this time capable of returning to his regular job which involves heavy lifting and pulling of cables but is capable of limited light duty work, lifting not to exceed approximately 25 pounds with the opportunity to change positions intermittently as needed. He is at this time partially disabled on an ongoing basis.

With respect to the possibility of additional surgery, based on his MRI findings, it is, in my opinion, unlikely that the patient would benefit from additional lumbar surgery since the MRI indicates that the primary problem is scar tissue and surgery for scar tissue is likely to be complicated by additional scar tissue formation post-operatively. The myelogram, however, in my opinion, is reasonable and may afford additional information in making a decision regarding the possibility of further surgical intervention.

Return to work in a limited light duty capacity would not be injurious to the patient's health."

Dr. David Siciliano, a chiropractic physician, stated as follows in his January 4, 1993 disability slip (RX 11):

> Mr. Chairadio (SIC) is being treated by this office for a work related low back injury. He has been disabled since December 24, 1992 and continues to be disabled until further notice.

The doctor's notes reflect that he had referred Claimant for a neurologic consultation by Dr. Carlo G. Brogna and the doctor, in his January 15, 1993 letter to Dr. Siciliano, concluded as follows (ALJ EX 4):

"In summary, I believe Mr. Chiaradio is experiencing a piriformis syndrome. My suspicion is he experienced an initial sprain injury in the back and buttocks in October which has gradually progressed to the point where the piriformis muscle group is now chronically inflamed and affecting the sciatic nerve which traverses this region.

"Plan:

1. I have given Mr. Chiaradio some information to read on the piriformis syndrome and I have drawn him a diagram so that he understands what I think is going on.

2. EMG
3. Stop the Relafen and switch to Decadron 4 mg. tablets taking 3 now and 2 tonight and then tapering down beginning with 2 in the morning and 1 at noon time tomorrow by 1/2 tablet each day and he will be off this next Friday.
4. Tagamet 400 mg. bid for the next two weeks.
5. Valium 2 mg. tablets taking 4 of the three times a day for three days, 3 three times a day for three days, the 2 every morning.
6. For pain Percocet 1 tablet every four to six hours since he was in so much pain."

Dr. Brogna next saw Claimant on February 1, 1993 and the doctor states as follows (RX 9):

"Mr. Chiaradio returns today in follow up. Essentially he does not feel he has made any improvement. He continues to have the pain in the buttocks radiating down the left leg with paresthesias in the posterior thigh and into the calf and foot.

"On examination he is very tender to palpation in the left buttocks which produced paresthesias down the leg. Deep tendon reflexes in the left ankle are normal. There is no definite weakness in the muscles of the left foot but he has difficulty moving it as it produces pain.

"Impression: Sciatic type pain which is not responding to conservative therapies. ? S1 radiculopathy.

"Plan:
1. He will continue taking the Relafen on a daily basis.
2. MRI to look at his lumbar spine.
3. If the MRI is normal he will try a nerve block in the left buttocks region."

The Employer referred Claimant for a neurologic consult by Dr. Mark Weimer and the doctor, in his February 8, 1993 report, stated as follows (ALJ EX 4):

"Mr. Chiaradio was evaluated by a Neurologist, Dr. Carlo Brogna, and an EMG was performed on January 15, 1993. The EMG was abnormal revealing proximal irritation of the sciatic nerve. There was no indication of nerve root dysfunction, as the paraspinal muscles were within normal limits.

"Plain films of the lumbar spine performed at Westerly Hospital on December 29, 1992 report minor degenerative changes. There was no fracture or subluxation or disc narrowing in the lumbar region.

"Lumbar CT scan performed on January 14, 1993 was reported as

normal.

"An MRI scan of the lumbosacral spine performed at Westerly Hospital on February 5, 1993 reports mild degenerative changes. There is a definite abnormality of the left S1 nerve root at the level of the superior S1 end plate which may be related to a small very focal herniation with overlying osteophyte formation . . . .

"**DIAGNOSIS:** Symptomatic left S1 radiculopathy.

"**ASSESSMENT:** It is my opinion, based on today's evaluation, that the initial complaint of low back and left leg radiating pain symptoms can be considered as causally related to the injury as described, which occurred October 8, 1992.

Examination today elicits the subjective symptoms of positive left straight leg raising without associated abnormal objective focal neurologic deficits. Specifically, there is no clinical evidence of motor or sensory loss involving the S1 nerve root and no deep tendon reflex abnormality.

It is my opinion, that the symptoms of positive straight leg raising of the left leg and the left S1 distribution can be considered as related to the abnormality noted on the MRI scan of February 5, 1993 with impingement upon the left S1 nerve root.

Since the neurologic examination remained essentially within normal limits, the patient can be treated with ongoing conservative management. The patient has not improved with chiropractic management to date. It is therefore my opinion that further chiropractic treatment would not be considered as reasonable and necessary. In my opinion, a physical therapy program would be reasonable for evaluation of treatment of this patient.

"In my opinion, he is currently capable of performing a light duty work with restricted lifting up to 20 pounds with no recurrent bending or stooping. I anticipate that in approximately three months he will be capable of returning back to regular duty work without restriction."

Claimant saw Dr. Brogna on February 10, 1993 for evaluation of "persistent and increasing pain in the buttocks radiating down the left leg" and the doctor, continuing Claimant's Percocet and Doxepin, opined that Claimant should be seen by a neurosurgeon for examination and a myelogram or repeat MRI. (RX 9)

On February 25, 1993 Dr. Siciliano sent the following disability slip to the Employer (RX 11):

Mr. Chiaradio is being seen by this office for a

> work related left low back/sciatic problem. He continues to experience fairly severe left low back and leg pain and discomfort. He underwent an MRI which showed the problem at the nerve root and disc. He is now waiting to see a Neurosurgeon in Providence. He remains totally disabled.

Dr. Neville Knuckey examined Claimant upon referral from Dr. Brogna and the doctor, in his March 9, 1993 report, states as follows (RX 13):

"Thank you for asking me to see Mr. Chiaradio, a 51-year-old gentleman with a past medical history of peptic ulcer disease and colitis. He smokes one pack of cigarettes a day.

"He works at Electric Boat and is involved in heavy manual labor. Over the years, he has had intermittent back pain.

"On October 8, 1992 he was lifting heavy cables at work. He was bending over and had an acute onset of low back pain that radiated down the posterior aspect of the left leg to the foot with paresthesia in the foot. He continued to work in December despite the pain. Despite resting over December and January, he has persistent back pain and leg pain. The back pain is constant, but the leg pain is aggravated by sitting or long periods of standing which will be associated with paresthesia in the lateral three toes of the left foot. He describes no left foot weakness. He describes no right leg symptoms, no bladder or bowel incontinence. There is no past history of infection, tumors or arthritis.

"On examination when I saw him today, his lumbar spine was non-tender, but back flexion was limited to 30 degrees. Straight leg raising on the right was to 90 degrees, on the left was to 20 degrees that precipitated leg pain. Abdominal examination normal. Neurological examination of the lower limbs was normal.

"I reviewed the EMG that is suggestive of an S1 nerve root irritation. The MRI shows lumbar disc degenerative disease, predominantly at L4-5 and L5-1 with the possibility of a small disc at L5-S1. The MRI is also suggestive of L5-S1 foraminal stenosis.

"Clinically, he would appear to have S1 sciatica, however, the MRI is not diagnostic of a significant herniated disc.

"To investigate this problem, I have arranged for a myelogram with CT."

Dr. Knuckey next saw Claimant on March 23, 1993, at which time . . . His principal symptom is back pain that radiates to the left buttock. Today, he complained of no leg pain.

On examination, there is a limitation of back movement.

I reviewed the lumbar myelogram and CT which shows lumbar spondylosis predominantly at L3, 4, 5 and L5, S1. At L5, S1, there is a very minimal central disc bulge that just abuts the nerve root. There is no major compression of the nerve root.

Based on the history of predominantly back and buttock pain and his myelographic findings, I do not believe surgical intervention is indicated. I discussed with the patient he should be treated conservatively with a back exercise program.

His clinical diagnosis is a back strain injury related to his injury at work on October 8, 1992. At this stage, he is disabled from his usual occupation which involves heavy lifting. However, a light duty program with lifting not greater than 20 lbs. nor excessive bending or sitting would be in his best interest.

Dr. Weiner reexamined Claimant on May 5, 1993 and the doctor gave this (ALJ EX 4):

"**INTERVAL HISTORY:** When I evaluated Mr. Chiaradio in this office on February 8, 1993, a diagnosis of symptomatic left S1 radiculopathy was made. The patient's symptoms were reproduced by a straight leg raising test on the left. No objective focal neurologic deficits were noted on examination other than the positive straight leg raising test.

Mr. Chiaradio continued treating with the chiropractor, Dr. Siciliano, up until March, 1993. He continues treating with Dr. Brogna at this time. He was referred by Dr. Brogna to Dr. Neville Knuckey.

A myelogram was performed at Rhode Island Hospital on March 12, 1993. Dr. Knuckey reports on March 23, 1993 that the myelogram and CT scan shows lumbar spondylosis predominantly at L3-4-5 and L5-S1. At L5-S1 there is a very minimal central disc bulge that just abuts the nerve root. There is no major compression of the nerve root. It was Dr. Knuckey's opinion that surgery was not indicated.

Mr. Chiaradio underwent a lumbar block at South County Hospital approximately four days ago.

A lumbar myelogram performed at Rhode Island Hospital on March 12, 1993 reports anterior extradural filling defects at one level of L3-4 and also L5-S1 with thickening of the right L5 root. The finding possibly represents disc disease.

A post myelogram contrast CT scan reports a mild eccentric disc bulge at L5-S1 causing some compression of the L5 nerve root on the

left. No impressions upon the thecal sac at any level. No evidence of disc herniations. Neural foramina are patent bilaterally at all levels. Degenerative changes are noted involving the facet joints at all levels. There is some spina bifida occulta at S1-2.

"**CURRENT COMPLAINTS:** He states that he is improved. He has relief of the pain radiating down the leg. He has improved back pain with pain radiating to the left buttock.

The patient is currently taking Relafen and Valium . . . .

"**DIAGNOSIS:** History of lumbosacral strain. No objective focal neurologic deficits.

"**ASSESSMENT:** It is my continued opinion based upon today's evaluation that the initial complaint of low back pain can be considered as causally related to the injury as described which occurred on October 8, 1992.

Mr. Chiaradio's condition has improved since he was previously evaluated on February 8, 1993. He has undergone a myelogram which was reported by Dr. Knuckey as showing no significant evidence of impingement on the S1 nerve root.

His symptoms have improved. He no longer has radicular complaints down the left leg. The examination has improved in that the straight leg raising test is now negative.

It is my opinion based upon today's examination that there is no ongoing disability at this time. In my opinion the patient has reached a medical end result and has achieved maximum medical benefit from treatment he has received to date with no ongoing disability at this time.

It is my opinion based upon today's examination that the patient is capable of returning back to his regular duty work without restriction.

All opinions expressed are to a reasonable degree of medical certainty."

Dr. Brogna continued to see Claimant as needed and, as of May 14, 1993, the doctor states as follows (RX 9):

"Over the past few weeks he has steadily been increasing his activity at Town Park Physical Therapy. They state that he has been making "good progress with tolerating increased activities in the clinic". He continues to complain of lumbosacral pain and left Sq pain and occasional buttocks pain.

"On examination today Phil looks comfortable. He has good mobility of the spine and neurological examination of the legs is normal.

"Impression: Back and left leg pain - resolved.

"I had a long discussion with Mr. Chiaradio regarding various options. At this point he feels well enough that he would like to try to get back to work without any restrictions. Since this is his preference I have gone along with this and have written him a letter to General Dynamics to this effect."

Claimant's symptoms continued and on June 25, 1993 Dr. Brogna referred Claimant "for an opinion regarding (his) back and left leg pain" and whether "Mr. Chiaradio has a surgically treatable cause of his back pain." (RX 9):

That neurosurgical consultation took place on July 15, 1993 and, according to Dr. Mario J. Sculco (RX 14):

"Patient has developed intractable pain commencing October 8, 1992 following a lifting injury which has persisted until present. Patient worked in pain and severely increasing pain from October to December of 1992 at which time he ceased and desisted working. MRI in February, several months after the injury, failed to reveal a compressive lesion but did show extensive degenerative discopathy. Myelogram, contrasted CAT scan also fail to reveal a significant compressive lesion despite persistent and intractable sacroiliac and sciatic pain.

"Patient returned to work on May 17, 1993 following an independent medical opinion but returned to work with intractable pain which has continued. In summary, the pain remains omnipresent and intractable, unrelieved by rest, in general moderately exacerbated by activity but severely present at times of bed, interfering with the patient's ability to sleep. Pain is located in the lumbosacral, left sacroiliac, left gluteal and left leg area . . . .

"IMPRESSION: Intractable pain syndrome not yet defined. The possibilities are as follows.

The patient may have pain of myelopathic origin which has not been identified. This would indicate the necessity of a thoracic and possibly a cervical lesion.

The patient's lesion could be extraspinal and may be retroperitoneal. A CT scan of the pelvis may be beneficial in elucidating such a lesion.

The third possibility is that the patient is suffering from a

traumatic compressive radiculitis which resolved upon the patient ceasing to work in December of 1992 but which resulted from ongoing root compression and severe radiculoneuritis, predominantly S1 and L5 levels. This would be in keeping with the patient's non-compressive findings on CT scan, myelogram and to a lesser degree MRI.

It is recommended that any patient with the intractable pain that this patient has should not be working. It is the examining neurosurgeon's recommendation that this patient be considered on temporary total disability.

This patient is discussed personally with Dr. Brogna and the diagnostic studies indicated to look elsewhere, either higher in the neuraxis or in the pelvis should be considered as part of his investigative work-up. Although the probability is not great that lesions other than in the lumbar spine will be located, this should be pursued. High doses of Amitriptyline combined with Thiamine 100 mg. t.i.d. may be beneficial in controlling the patient's neuropathic pain. This will absolutely require him to be out of work as the high doses of Elavil may be to some degree sedating.

I will be happy to re-evaluate the patient and reassess any of his studies. At this time one cannot advise lumbar surgery in particular as a step which has a high probability of resulting in relief for the patient's pain."

As of August 13, 1993, Dr. Brogna opined that Claimant "is probably permanently partially disabled" but he has not yet reached maximum medical improvement and that "it would (be) premature to fill out the (disability) form." (RX 9)

As of August 13, 1993, Dr. Brogna concluded as follows (**Id.**):

"I believe that the etiology of the problem is primarily due to degenerative changes in the lumbar spine. In reviewing the MRI of the lumbar spine of 2/5/93 they comment on moderate to advanced degenerative changes in all the lower lumbar discs. In addition there is posterior bulging and overlying osteophytic lipping at L3-4 through L5-S1 particularly in the posterior lateral regions. They comment on a 'bridging osteophyte is noted on the left at L5-S1 anterior to the S1 nerve root, possibly associated with a very small herniation at this area'.

“At this point I do not find any evidence of definite neurologic compromise. I believe the chronic pain is emanating from degenerative changes in the lumbar spine.”

Dr. Brogna continued Claimant’s Relafen and substituted Doxepin for the Elavil and recommended that he continue with his exercise program at Town Park Physical Therapy. According to the doctor, Claimant “is at work and continues to manage as best as he can.”

Dr. Brogna continued to see Claimant as needed and he also went to see Dr. Sculco on September 29, 1993 and, according to the doctor’s progress note (RX 14):

Patient has developed some left sacroiliac and sciatic pain. This has increased. This came on despite a course of physical therapy. There is intractable low back pain and left sciatica, there are degenerative changes and degenerative discopathy but no herniation has been identified.

Patient continues to work at a job which he finds difficult and increases his pain.

ON EXAMINATION: He walks on his toes and heels. Straight leg raising is positive at 30º on the left, 60º on the right. Nafziger’s positive, Laseque’s Maneuver positive. Toe and heel gait intact.

IMPRESSION: Severe sciatic pain without gross neurologic deficit however there is sensory deficit suggesting L5 distribution on the left side.

RECOMMENDATION: Consideration for patient being given selected light duty work.

Pain clinic management, Epidural steroids have not been beneficial, facet blocks have not been tried. These may be beneficial. Patient will give some consideration to combined facet and epidural block along with consideration for retirement on permanent partial disability as he is incapable of carrying out his duties.

Dr. Brogna next saw Claimant on October 8, 1993 and, according to the doctor (RX 9):

He continues to have pain in the left lumbar region radiating into the left buttocks. He is presently taking all his medications, Doxepin 50 mg. at night, Relafen 4 times a day, Soma 1/2 to 1 tablet bid or tid and at least 2 to 4 Percocets each day.

From a functional standpoint he is continuing on at EB. He has

been getting some help from his colleagues there and manages to put in pretty much a full day. By the end the pain is constant and intense throughout the lumbar and buttocks region. There is not much radiation into the lower left leg.

Exam today shows spasm in the lower left lumbar region. There is tenderness of the overlying muscles in the left lumbar paraspinals and buttocks. Strength seems normal in the foot.

Impression: Chronic left lower back and buttocks pain. I believe this is probably due to degenerative changes of the lower lumbar spine and chronic muscle strain in that area. Mr. Chiaradio has spoken to Dr. Sculco about this who was not enthusiastic at all about possibilities for curing this with surgery. He offered some kind of a shot which to me sounds like it would be a facet block and this is actually an excellent idea.

As of December 10, 1993 Dr. Brogna reported as follows (RX 9):

Phil returns today with continued persistent left buttock to left leg radiating pain. He still has been going to work but has been using two to four Percocet a day.

Examination today shows normal left deep tendon reflex. There is decreased sensation along the lateral edge of the left foot. There is no overt weakness.

In reviewing his chart today, MRIs of the spine and even the myelogram with CT follow-up have all suggested there is some abnormality in the left S1 nerve region.

My suspicion is that his problem is compression of the left S1 nerve root due to either bulging disc or possibly some osteophyte formation.

PLAN:
1. I have given him some Percocet.
2. I suggested he see another neurosurgeon. I have referred him to Dr. Michael Olin who has done a lot of fine surgery. From a clinical standpoint, I am convinced that Mr. Chiaradio's problem is in fact in the left S1 nerve root.

Dr. Michael S. Olin, a specialist in neurological surgery, examined Claimant on December 27, 1993 and the doctor states as follows in his report (RX 10):

Thank you very much for allowing me to see Mr. Philip Chiaradio who comes to the office today the 27th of December, 1993. He was lifting some heavy cable. Since that time he's been complaining bitterly of back pain and pain that goes into the left

buttock and down the left leg. He's seen a neurosurgeon in Norwich as well as a neurosurgeon at Rhode Island Hospital in the past for evaluation. He's had extensive testing which includes EMG with the understanding that there are abnormalities in the S1 nerve root distribution, as well as myelogram, postmyelogram C-T scan and MRI. All of these tests show abnormalities at L5-S1 to the left with foraminal stenosis and some disc changes. There's no large herniated fragment and there are some minor changes at other levels. He's had extensive physical therapy and medication treatment and has not resolved his problem. He comes to the office today disgusted and frustrated because he's unable to live comfortably and is trying to do light duty work without much success. He's been taking large doses of narcotic analgesics. His past history is significant for a TIA or stroke for which he needs to use an aspirin per day. He's also had a gastrectomy for ulcer disease. He states he's allergic to penicillin. He smokes about a pack of cigarettes per day but does not use excessive alcohol.

Examination shows a thin, well developed gentleman with anterior range of motion to about 30 degrees. He is able to toe and heel walk but seems uncomfortable and tries to keep weight off his left leg. I am able to elicit reflexes at both knee and ankle jerks and they are trace to 1+ bilaterally.

I reviewed the records very carefully including the imaging studies which he brought with him. I appreciate your allowing me to see the extensive notes which he brought with him. I explained to him very carefully that surgical treatment would not be guaranteed to relieve his problem especially since it has reached the point of chronicity. I carefully explained the risks and complication factors to him and the possibility that he might come out of surgery worse or no better than he is now. I can also not predict if he'll be capable of returning to his usual and customary occupation which seems to be heavy work.

The patient thoroughly understands all of our discussion and feels that he can no longer live with the pain in this fashion. He has asked me to proceed with surgery and obtain permission from the insurance carrier. As discussed with him, I would plan to do a foraminotomy for decompression of the S1 nerve root on the left as well as inspection of the disc space with probable removal of degenerated disc material, according to the doctor.

The severe back and leg symptoms continued and Dr. Brogna, taking Claimant out of work as of January 21, 1994, prescribed "resting at home, taking his medications and following his exercise program." Claimant was admitted to the hospital and on March 23, 1994 he underwent a left L5-S1 hemilaminectomy, foraminotomy, and discectomy.

Claimant returned to see Dr. Olin on April 20, 1994, at which time the doctor reported as follows (RX 10):

"Patient returns to the office today the 20th of April, 1994. He continues to complain of back pain and pain going into his left leg. The only difference from preoperatively is that the pain does not extend beyond his left knee as it had previously. This is a partial improvement. He complains that after about 15 minutes of being outside and walking his left leg fatigues although on examination he's able to heel and toe walk without difficulty and has no asymmetry. Likewise his deep tendon reflexes appear to be 1+ and symmetrical as previously. Anterior range of motion is limited and the laminectomy wound is well healed.

"The patient's surgical results thus far are disappointing. He did get only partial relief and I'm wondering if he can't be enrolled in physical therapy down in Westerly through your care as further benefits might be obtainable. I'd be happy to see him again after he completes the therapy program which I would expect to run from one to three months. I explained to the patient very carefully that surgery was maximized in terms of doing foraminotomy and decreasing any pressure on the S1 root. Certainly from the intraoperative findings I feel that any pressure from the disc and into the foramen was adequately attended to. His preoperative status suggested that his condition was becoming chronic which make matters more difficult. At the same token we did get partial benefit and I'm hopeful that physical therapy will give him some further relief.

"At any rate I don't plan any further surgical input but would be happy to see the patient after he completes a full course of physical therapy in 60 to 90 days and refer him back to you for that purpose."

The Employer then referred Claimant to Dr. Philo F. Willetts, Jr., an orthopedic surgeon, and the doctor, in his June 1, 1994 report, commented as follows (RX 7):

"DIAGNOSIS:

1. Status post surgical treatment of herniated L5-S1 intervertebral disc, with residual low back and left lower extremity pain.
2. No objective sign of neurological deficit.

"DISCUSSION: I will attempt to respond to your questions in order as follows:

1. *Is he currently disabled due to this injury and is it the sole cause of disability?*

Although somewhat improved, I believe Philip Chiaradio is substantially disabled due to the injury of December 8, 1992. That injury, however, is not the sole cause of his disability. This examiner had seen Mr. Chiaradio in 1987, for very similar findings which were believed, clinically, to be the result of a herniated L5-S1 disc at that time. I believe that the underlying lesion has been present, to some extent, for several years.

2. If so, is he totally disabled or may he perform selected work?

I believe that Philip Chiaradio is very substantially disabled, and is probably practically disabled from most of the jobs at Electric Boat Division at this time. He could perform very sedentary work if he were able to occasionally rest. Practically, there are probably not such jobs available at Electric Boat.

3. If capable of light work, what restrictions would you place on him?

In my opinion, Philip Chiaradio must be able to frequently change positions as comfort dictates. I believe that he should avoid lifting over 15 pounds, avoid any tight compartments, and avoid more than an infrequent bending. He could probably not work more than four hours per day at this time.

I believe that he could use his hands without further restriction, use his right foot for foot pedal controls, and could occasionally climb and descend stairs."

Dr. Brogna next saw Claimant on June 24, 1994, August 4, 1994 and on November 14, 1994, at which point the doctor's impression was "status post lumbar diskectomy with almost complete return of function at this point," the doctor recommending that Claimant continue with his exercise program "indefinitely," that "he continue to go to the pool on occasion as (the doctor thought) swimming is good." According to the doctor, Claimant "is ready to go back to work pretty much with hardly any limitations" and he "is essentially back to baseline." The doctor had no further "neurodiagnostic interventions" or surgery to prescribe for the Claimant and the doctor "discharg(ed) him from neurologic care." (RX 9)

As of March 3, 1995 Dr. Brogna sent the following letter to Claimant's attorney (**Id.**):

"I first saw Mr. Chiaradio on January 15, 1993 upon referral from Dr. David J. Siciliano regarding back and left leg pain. At that time he had an essentially normal examination except for mild sensory changes in the left foot. His symptoms persisted and he developed increased pain in the buttock radiating into the left

leg. Because of that MRI was performed which showed an abnormality in the region of the left S1 nerve root... CT of the lumbar spine on March 13, 1993 demonstrated a mild eccentric disc bulge at L5/S1 causing some compression of the S1 nerve root on the left. By May 14, 1993, the patient reported improvement in his symptoms and felt well enough that he wished to try to go back to work at Electric Boat without restrictions. When seen on June 25, 1993 he still had some persistent left lumbar and buttock pain and for this reason I referred him for a second neurosurgical opinion. At that point it was still felt that surgery was not indicated. By the end of 1993, Mr. Chiaradio continued to have problems and when operated upon March 23, 1994 a large amount of disc material was extracted which had compressed the left S1 nerve root. Since then Mr. Chiaradio has gradually improved. However, he still remains with back pain and some limitations. His most recent examination on January 30, 1995 showed some decreased range of motion in the back to approximately 40 degrees flexion, 25 degrees extension, 20 degrees right and left lateral bend. Strength in the legs as well as reflexes and sensation is entirely normal. Straight leg raising while seated was also normal.

"Therefore, based on the patient's history and present examination, I believe Mr. Chiaradio has a permanent partial impairment related to his back injury and resulting surgery. According to the criteria established in the Guide to Evaluation of Permanent Impairment, Fourth Edition, Mr. Chiaradio's classification of a DRE Thoracolumbar Category II. His whole person impairment is 7.5%," or ten (10%) of the lumbosacral spine. (**Id.**)

Dr. Brogna continued to see Claimant as needed and his office visit notes are in evidence as RX 9.

Dr. Willetts reexamined Claimant on December 8, 1997 and the doctor concludes as follows (RX 5):

"DIAGNOSIS:

1. Status post surgical treatment of herniated disc with residual scar tissue and complaints of low back and left lower extremity pain and numbness.
2. No sign of surgically herniated discs at this time.

"DISCUSSION: I will attempt to respond to your questions as follows:

1. Is he currently disabled due to this injury and is it the sole cause of his disability?

Mr. Chiaradio is partially disabled as a result of this injury. The cable lifting incident of October 8, 1992, was not the sole cause of his disability. He had been treated by this examiner for

rather similar back pain in November, 1987, and had a previous history of back pains while working heavy construction in the early 1970's. Nor was the incident of June 16, 1996, the sole cause of his disability which resulted from his October 8, 1992, and previous conditions.

2. If so, is he totally disabled or may he perform selected work?

Philip Chiaradio does appear to be very substantially disabled. He could do sedentary work, however.

3. If capable of light work, what restrictions would you place on him?

Philip Chiaradio should avoid lifting more than 15 pounds, avoid repetitive bending, should avoid working more than four hours per day, and should avoid climbing vertical ladders. He could sit, stand, walk, or drive, so long as he were able to frequently change positions as comfort dictated. He could use his feet for foot pedal controls and his hands without further restriction.

4. Has he reached a point of maximum medical improvement? Yes.

5. If so, when?

He stated he reached maximum medical improvement in June, 1994. I would accept that.

6. If so, what percentage of permanent functional loss of use pursuant to the fourth edition of the AMA guidelines does he have due to this condition? Please apportion the impairment specific to the injury and the impairment attributable to the pre-existing conditions or factors.

Using as a guide The American Medical Association Guides to the Evaluation of Permanent Impairment, Fourth Edition, there is a permanent partial physical impairment determined as follows.

Based upon Table 71 on page 109, he would most appropriately be rated in DRE Impairment Category III in Table 72 on page 110 of the AMA Guides. That is rated at 10% permanent partial physical impairment of the whole person. Using paragraph 3.3k on page 131 of the AMA Guides, this 10% whole person impairment is equivalent to 13% permanent partial physical impairment of the lumbar spine.

“APPORTIONMENT: Mr. Chiaradio has had a history of back pain as early as 1972 when working heavy construction, was seen by me in 1987 for very similar left low back and left lower extremity pain, sustained increased pain when he pulled cables October 8, 1992, and noted increased pain by June, 1996. Of the 13% permanent partial

physical impairment of the lumbar spine, in my opinion, 5% preexisted October 8, 1992. Another 5% permanent partial physical impairment of the lumbar spine could fairly be apportioned to the cable pulling incident of October 8, 1992. The remaining 3% permanent partial physical impairment could fairly be apportioned to the increased pain reported after working June 16, 1996.

7. Is his injury of (all dates) causally related to his employment at Electric Boat Corporation?

No. His back injuries of the early 1970's were associated with his heavy construction work done at that time, before he began working for Electric Boat Corporation in 1976. His back injury of 1987 was said to be nonwork related but increased when he worked for his cousin's masonry business. He also had an episode of back pain, for which I had seen him, on April 27, 1991. Then he claimed to have slipped on oil at work but, in fact, actually had a viral herpes zoster (shingles) cause of that pain. That was, despite representations to the contrary, totally nonwork related. If the above history is correct, a cable pulling incident of October 8, 1992, and subsequent increased pain in June, 1996, were causally related to his employment at Electric Boat Corporation.

8. Did he have any previous condition or injury which would combine with this injury to make his present injury materially and substantially greater?

Yes. He had had episodes of back pain, for which he had treated with Dr. Joseph Siciliano in the early 1970's. I had seen him for an episode of left low back and left lower extremity pain in November, 1987. In addition, he had had substantial removal of his stomach for ulcer disease many years ago. Thus, the previous conditions, when combined with the October 8, 1992, cable pulling incident, did produce materially and substantially greater injury than what would have been produced by pulling cables on October 8, 1992, alone.

The 1970's back pain episodes, the November, 1987, nonwork-related back pain condition, and the October 8, 1992, low back injury, when combined with the increased pain noted on or about June 16, 1996, did produce materially and substantially greater injury than what would have been produced by activities on or about June 16, 1996, alone.

9. Could you ask the claimant if he has worked in any capacity since his injury? What physical activity does he engage in?

He stated that, other than working at Electric Boat itself, he had not worked at all or in any capacity since October 8, 1992.

Currently, he said he did no housework. He said he did light yard work about one hour per day, walked one hour per day, shopped and ran errands one hour per day, visited friends two hours per day, had a computer hobby one-half hour per day, read one hour per day, watched television two hours per day, and laid down for one hour per day.

On the basis of the totality of this closed record,[1] I make the following:

Findings of Fact and Conclusions of Law

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its provisions. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff'd**, 620 F.2d 71 (5th Cir. 1980); **Hampton v. Bethlehem Steel Corp.**, 24 BRBS 141 (1990); **Anderson v. Todd Shipyards**, **supra**, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that

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[1]As the Employer has accepted this claim and in view of Claimant's multiple medical problems, Claimant was excused from attending the hearing and Claimant testified herein by deposition. (RX 25)

"[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor**, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), **rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." **Id.** The presumption, though, is applicable once claimant establishes that he has sustained an injury, **i.e.**, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984); **Kelaita**, **supra**. Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989); **Kier**, **supra**. Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981); **Holmes v. Universal Maritime Serv. Corp.**, 29 BRBS 18 (1995). In such cases, I must weigh all of the evidence relevant to the causation issue. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **Holmes**, **supra**; **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

To establish a **prima facie** case for invocation of the Section 20(a) presumption, claimant must prove that (1) he suffered a harm,

and (2) an accident occurred or working conditions existed which could have caused the harm. **See**, **e.g.**, **Noble Drilling Company v. Drake**, 795 F.2d 478, 19 BRBS 6 (CRT) (5th Cir. 1986); **James v. Pate Stevedoring Co.**, 22 BRBS 271 (1989). If claimant's employment aggravates a non-work-related, underlying disease so as to produce incapacitating symptoms, the resulting disability is compensable. **See Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986); **Gardner v. Bath Iron Works Corp.**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). If employer presents "specific and comprehensive" evidence sufficient to sever the connection between claimant's harm and his employment, the presumption no longer controls, and the issue of causation must be resolved on the whole body of proof. **See**, **e.g.**, **Leone v. Sealand Terminal Corp.**, 19 BRBS 100 (1986).

Employer contends that Claimant did not establish a **prima facie** case of causation and, in the alternative, that there is substantial evidence of record to rebut the Section 20(a), 33 U.S.C. §920(a), presumption. I reject both contentions. The Board has held that credible complaints of subjective symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case for Section 20(a) invocation. **See Sylvester v. Bethlehem Steel Corp.**, 14 BRBS 234, 236 (1981), **aff'd**, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982). Moreover, I may properly rely on Claimant's statements to establish that he/she experienced a work-related harm, and as it is undisputed that a work accident occurred which could have caused the harm, the Section 20(a) presumption is invoked in this case. **See**, **e.g.**, **Sinclair v. United Food and Commercial Workers**, 23 BRBS 148, 151 (1989). Moreover, Employer's general contention that the clear weight of the record evidence establishes rebuttal of the pre-presumption is not sufficient to rebut the presumption. **See generally Miffleton v. Briggs Ice Cream Co.**, 12 BRBS 445 (1980).

The presumption of causation can be rebutted only by "substantial evidence to the contrary" offered by the employer. 33 U.S.C. §920. What this requirement means is that the employer must offer evidence which completely **rules out the** connection between the alleged event and the alleged harm. In **Caudill v. Sea Tac Alaska Shipbuilding**, 25 BRBS 92 (1991), the carrier offered a medical expert who testified that an employment injury did not "play a significant role" in contributing to the back trouble at issue in this case. The Board held such evidence insufficient as a matter of law to rebut the presumption because the testimony did not completely rule out the role of the employment injury in contributing to the back injury. **See also Cairns v. Matson Terminals, Inc.**, 21 BRBS 299 (1988) (medical expert opinion which did entirely attribute the employee's condition to non-work-related factors was nonetheless insufficient to rebut the presumption where

the expert equivocated somewhat on causation elsewhere in his testimony). Where the employer/carrier can offer testimony which completely severs the causal link, the presumption is rebutted. **See Phillips v. Newport News Shipbuilding & Dry Dock Co.**, 22 BRBS 94 (1988) (medical testimony that claimant's pulmonary problems are consistent with cigarette smoking rather than asbestos exposure sufficient to rebut the presumption).

For the most part only medical testimony can rebut the Section 20(a) presumption. **But see Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989) (holding that asbestosis causation was not established where the employer demonstrated that 99% of its asbestos was removed prior to the claimant's employment while the remaining 1% was in an area far removed from the claimant and removed shortly after his employment began). Factual issues come in to play only in the employee's establishment of the **prima facie** elements of harm/possible causation and in the later factual determination once the Section 20(a) presumption passes out of the case.

Once rebutted, the presumption itself passes completely out of the case and the issue of causation is determined by examining the record "as a whole." **Holmes v. Universal Maritime Services Corp.**, 29 BRBS 18 (1995). Prior to 1994, the "true doubt" rule governed the resolution of all evidentiary disputes under the Act; where the evidence was in equipoise, all factual determinations were resolved in favor of the injured employee. **Young & Co. v. Shea**, 397 F.2d 185, 188 (5th Cir. 1968), **cert. denied,** 395 U.S. 920, 89 S. Ct. 1771 (1969). The Supreme Court held in 1994 that the "true doubt" rule violated the Administrative Procedure Act, the general statute governing all administrative bodies. **Director, OWCP v. Greenwich Collieries**, 512 U.S. 267, 114 S. Ct. 2251, 28 BRBS 43 (CRT) (1994). Accordingly, after **Greenwich Collieries** the employee bears the burden of proving causation by a preponderance of the evidence after the presumption is rebutted.

As neither party disputes that the Section 20(a) presumption is invoked, **see Kelaita v. Triple A Machine Shop**, 13 BRBS 326 (1981), the burden shifts to employer to rebut the presumption with substantial evidence which establishes that claimant's employment did not cause, contribute to, or aggravate his condition. **See Peterson v. General Dynamics Corp.**, 25 BRBS 71 (1991), **aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor**, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), **cert. denied,** 507 U.S. 909, 113 S. Ct. 1264 (1993); **Obert v. John T. Clark and Son of Maryland**, 23 BRBS 157 (1990); **Sam v. Loffland Brothers Co.**, 19 BRBS 228 (1987). The unequivocal testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. **See Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). If an employer submits

substantial countervailing evidence to sever the connection between the injury and the employment, the Section 20(a) presumption no longer controls and the issue of causation must be resolved on the whole body of proof. **Stevens v. Tacoma Boatbuilding Co.**, 23 BRBS 191 (1990). This Administrative Law Judge, in weighing and evaluation all of the record evidence, may place greater weight on the opinions of the employee's treating physician as opposed to the opinion of an examining or consulting physician. In this regard, **see Pietrunti v. Director, OWCP**, 119 F.3d 1035, 31 BRBS 84 (CRT)(2d Cir. 1997).

In the case **sub judice**, Claimant alleges that the harm to his bodily frame, **i.e.**, his chronic lumbar disc disease, resulted from working conditions at the Employer's shipyard. The Employer has introduced no evidence severing the connection between such harm and Claimant's maritime employment. In this regard, **see Romeike v. Kaiser Shipyards**, 22 BRBS 57 (1989). Thus, Claimant has established a **prima facie** claim that such harm is a work-related injury, as shall now be discussed.

Injury

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. **See** 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Janusziewicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent

injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos**, **supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

In occupational disease cases, there is no "injury" until the accumulated effects of the harmful substance manifest themselves and claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease and the death or disability. **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied**, 350 U.S. 913 (1955); **Thorud v. Brady-Hamilton Stevedore Company, et al.**, 18 BRBS 232 (1987); **Geisler v. Columbia Asbestos, Inc.**, 14 BRBS 794 (1981). Nor does the Act require that the injury be traceable to a definite time. The fact that claimant's injury occurred gradually over a period of time as a result of continuing exposure to conditions of employment is no bar to a finding of an injury within the meaning of the Act. **Bath Iron Works Corp. v. White**, 584 F.2d 569 (1st Cir. 1978).

This closed record conclusively establishes, and I so find and conclude, that Claimant sustained a work-related injury on June 16, 1996, at which time he had to stop working because of the cumulative effect of his multiple medical problems, that the Employer had timely notice thereof, has authorized appropriate medical care and treatment and has paid appropriate compensation benefits to Claimant while he has been unable to return to work and that he timely filed for benefits once a dispute arose between the parties. In fact, the principal issue is the nature and extent of Claimant's disability, an issue I shall now resolve.

Nature and Extent of Disability

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. **Quick v. Martin**, 397 F.2d 644 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F. Supp. 770 (D.Md. 1967), **aff'd**, 396 F.2d 783 (4th Cir. 1968), **cert. denied**, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine, Inc.**, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability

if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (**Id.** at 1266)

Claimant has the burden of proving the nature and extent of his disability without the benefit of the Section 20 presumption. **Carroll v. Hanover Bridge Marina**, 17 BRBS 176 (1985); **Hunigman v. Sun Shipbuilding & Dry Dock Co.**, 8 BRBS 141 (1978). However, once Claimant has established that he is unable to return to his former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternate employment or realistic job opportunities which claimant is capable of performing and which he could secure if he diligently tried. **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F.2d 1031 (5th Cir. 1981); **Air America v. Director**, 597 F.2d 773 (1st Cir. 1979); **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Preziosi v. Controlled Industries**, 22 BRBS 468, 471 (1989); **Elliott v. C & P Telephone Co.**, 16 BRBS 89 (1984). While Claimant generally need not show that he has tried to obtain employment, **Shell v. Teledyne Movible Offshore, Inc.**, 14 BRBS 585 (1981), he bears the burden of demonstrating his willingness to work, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), once suitable alternate employment is shown. **Wilson v. Dravo Corporation**, 22 BRBS 463, 466 (1989); **Royce v. Elrich Construction Company**, 17 BRBS 156 (1985).

On the basis of the totality of this closed record, I find and conclude that Claimant has established that he cannot return to work as a pre-heat electrician. The burden thus rests upon the Employer to demonstrate the existence of suitable alternate employment in the area. If the Employer does not carry this burden, Claimant is entitled to a finding of total disability. **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Southern v. Farmers Export Company**, 17 BRBS 64 (1985). In the case at bar, the Employer did not submit any evidence as to the availability of suitable alternate employment. **See Pilkington v. Sun Shipbuilding and Dry Dock Company**, 9 BRBS 473 (1978), **aff'd on reconsideration after remand**, 14 BRBS 119 (1981). **See also Bumble Bee Seafoods v. Director, OWCP**, 629 F.2d 1327 (9th Cir. 1980). I therefore find Claimant has a total disability.

Claimant's injury has become permanent. A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. **General Dynamics Corporation v. Benefits Review Board**, 565 F.2d 208 (2d Cir. 1977); **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968), **cert. denied**, 394 U.S. 976 (1969); **Seidel v. General Dynamics Corp.**, 22 BRBS 403, 407 (1989); **Stevens v. Lockheed**

Shipbuilding Co., 22 BRBS 155, 157 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56 (1985); **Mason v. Bender Welding & Machine Co.**, 16 BRBS 307, 309 (1984). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of "maximum medical improvement." The determination of when maximum medical improvement is reached so that claimant's disability may be said to be permanent is primarily a question of fact based on medical evidence. **Lozada v. Director, OWCP**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Care v. Washington Metropolitan Area Transit Authority**, 21 BRBS 248 (1988); **Wayland v. Moore Dry Dock**, 21 BRBS 177 (1988); **Eckley v. Fibrex and Shipping Company**, 21 BRBS 120 (1988); **Williams v. General Dynamics Corp.**, 10 BRBS 915 (1979).

The Benefits Review Board has held that a determination that claimant's disability is temporary or permanent may not be based on a prognosis that claimant's condition may improve and become stationary at some future time. **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979). The Board has also held that a disability need not be "eternal or everlasting" to be permanent and the possibility of a favorable change does not foreclose a finding of permanent disability. **Exxon Corporation v. White**, 617 F.2d 292 (5th Cir. 1980), **aff'g** 9 BRBS 138 (1978). Such future changes may be considered in a Section 22 modification proceeding when and if they occur. **Fleetwood v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 282 (1984), **aff'd**, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985).

Permanent disability has been found where little hope exists of eventual recovery, **Air America, Inc. v. Director, OWCP**, 597 F.2d 773 (1st Cir. 1979), where claimant has already undergone a large number of treatments over a long period of time, **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979), even though there is the possibility of favorable change from recommended surgery, and where work within claimant's work restrictions is not available, **Bell v. Volpe/Head Construction Co.**, 11 BRBS 377 (1979), and on the basis of claimant's credible complaints of pain alone. **Eller and Co. v. Golden**, 620 F.2d 71 (5th Cir. 1980). Furthermore, there is no requirement in the Act that medical testimony be introduced, **Ballard v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 676 (1978); **Ruiz v. Universal Maritime Service Corp.**, 8 BRBS 451 (1978), or that claimant be bedridden to be totally disabled, **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968). Moreover, the burden of proof in a temporary total case is the same as in a permanent total case. **Bell**, **supra**. **See also Walker v. AAF Exchange Service**, 5 BRBS 500 (1977); **Swan v. George Hyman Construction Corp.**, 3 BRBS 490 (1976). There is no requirement that claimant undergo vocational rehabilitation testing prior to a

finding of permanent total disability, **Mendez v. Bernuth Marine Shipping, Inc.**, 11 BRBS 21 (1979); **Perry v. Stan Flowers Company**, 8 BRBS 533 (1978), and an award of permanent total disability may be modified based on a change of condition. **Watson v. Gulf Stevedore Corp.**, **supra**.

An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement. **Lozada v. General Dynamics Corp.**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Sinclair v. United Food & Commercial Workers**, 13 BRBS 148 (1989); **Trask v. Lockheed Shipbuilding & Construction Co.**, 17 BRBS 56 (1985). A condition is permanent if claimant is no longer undergoing treatment with a view towards improving his condition, **Leech v. Service Engineering Co.**, 15 BRBS 18 (1982), or if his condition has stabilized. **Lusby v. Washington Metropolitan Area Transit Authority**, 13 BRBS 446 (1981).

On the basis of the totality of the record, I find and conclude that Claimant has been permanently and totally disabled from June 19, 1996, when he was forced to discontinue working as a result of the cumulative effect of his work-related injury or occupational disease.

Medical Expenses

An Employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. **Colburn v. General Dynamics Corp.**, 21 BRBS 219, 22 (1988); **Barbour v. Woodward & Lothrop, Inc.**, 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. **Addison v. Ryan-Walsh Stevedoring Company**, 22 BRBS 32, 36 (1989); **Mayfield v. Atlantic & Gulf Stevedores**, 16 BRBS 228 (1984); **Dean v. Marine Terminals Corp.**, 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. **Tough v. General Dynamics Corporation**, 22 BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978).

Interest

Although not specifically authorized in the Act, it has been

accepted practice that interest at the rate of six (6) percent per annum is assessed on all past due compensation payments. **Avallone v. Todd Shipyards Corp.**, 10 BRBS 724 (1978). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. **Watkins v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 556 (1978), **aff'd in pertinent part** and **rev'd on other grounds sub nom. Newport News v. Director, OWCP**, 594 F.2d 986 (4th Cir. 1979); **Santos v. General Dynamics Corp.**, 22 BRBS 226 (1989); **Adams v. Newport News Shipbuilding**, 22 BRBS 78 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 26, 50 (1989); **Caudill v. Sea Tac Alaska Shipbuilding**, 22 BRBS 10 (1988); **Perry v. Carolina Shipping**, 20 BRBS 90 (1987); **Hoey v. General Dynamics Corp.**, 17 BRBS 229 (1985). The Board concluded that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimant whole, and held that ". . . the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." **Grant v. Portland Stevedoring Company**, 16 BRBS 267, 270 (1984), **modified on reconsideration**, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

Section 14(e)

Claimant is not entitled to an award of additional compensation, pursuant to the provisions of Section 14(e), as the Employer has accepted the claim, provided the necessary medical care and treatment and voluntarily paid compensation benefits from the day of his disability to the present time and continuing. **Ramos v. Universal Dredging Corporation**, 15 BRBS 140, 145 (1982); **Garner v. Olin Corp.**, 11 BRBS 502, 506 (1979).

Section 8(f) of the Act

Regarding the Section 8(f) issue, the essential elements of that provision are met, and employer's liability is limited to one hundred and four (104) weeks, if the record establishes that (1) the employee had a pre-existing permanent partial disability, (2) which was manifest to the employer prior to the subsequent compensable injury and (3) which combined with the subsequent injury to produce or increase the employee's permanent total or partial disability, a disability greater than that resulting from

the first injury alone. **Lawson v. Suwanee Fruit and Steamship Co.**, 336 U.S. 198 (1949); **FMC Corporation v. Director, OWCP**, 886 F.2d 1185, 23 BRBS 1 (CRT) (9th Cir. 1989); **Director, OWCP v. Cargill, Inc.**, 709 F.2d 616 (9th Cir. 1983); **Director, OWCP v. Newport News & Shipbuilding & Dry Dock Co.**, 676 F.2d 110 (4th Cir. 1982); **Director, OWCP v. Sun Shipbuilding & Dry Dock Co.**, 600 F.2d 440 (3rd Cir. 1979); **C & P Telephone v. Director, OWCP**, 564 F.2d 503 (D.C. Cir. 1977); **Equitable Equipment Co. v. Hardy**, 558 F.2d 1192 (5th Cir. 1977); **Shaw v. Todd Pacific Shipyards**, 23 BRBS 96 (1989); **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989); **McDuffie v. Eller and Co.**, 10 BRBS 685 (1979); **Reed v. Lockheed Shipbuilding & Construction Co.**, 8 BRBS 399 (1978); **Nobles v. Children's Hospital**, 8 BRBS 13 (1978). The provisions of Section 8(f) are to be liberally construed. **See Director v. Todd Shipyard Corporation**, 625 F.2d 317 (9th Cir. 1980). The benefit of Section 8(f) is not denied an employer simply because the new injury merely aggravates an existing disability rather than creating a separate disability unrelated to the existing disability. **Director, OWCP v. General Dynamics Corp.**, 705 F.2d 562, 15 BRBS 30 (CRT) (1st Cir. 1983); **Kooley v. Marine Industries Northwest**, 22 BRBS 142, 147 (1989); **Benoit v. General Dynamics Corp.**, 6 BRBS 762 (1977).

The employer need not have actual knowledge of the pre-existing condition. Instead, "the key to the issue is the availability to the employer of knowledge of the pre-existing condition, not necessarily the employer's actual knowledge of it." **Dillingham Corp. v. Massey**, 505 F.2d 1126, 1228 (9th Cir. 1974). Evidence of access to or the existence of medical records suffices to establish the employer was aware of the pre-existing condition. **Director v. Universal Terminal & Stevedoring Corp.**, 575 F.2d 452 (3d Cir. 1978); **Berkstresser v. Washington Metropolitan Area Transit Authority**, 22 BRBS 280 (1989), **rev'd and remanded on other grounds sub nom. Director v. Berstresser**, 921 F.2d 306 (D.C. Cir. 1990); **Reiche v. Tracor Marine, Inc.**, 16 BRBS 272, 276 (1984); **Harris v. Lambert's Point Docks, Inc.**, 15 BRBS 33 (1982), **aff'd**, 718 F.2d 644 (4th Cir. 1983); **Delinski v. Brandt Airflex Corp.**, 9 BRBS 206 (1978). Moreover, there must be information available which alerts the employer to the existence of a medical condition. **Eymard & Sons Shipyard v. Smith**, 862 F.2d 1220, 22 BRBS 11 (CRT) (5th Cir. 1989); **Armstrong v. General Dynamics Corp.**, 22 BRBS 276 (1989); **Berkstresser**, **supra**, at 283; **Villasenor v. Marine Maintenance Industries**, 17 BRBS 99, 103 (1985); **Hitt v. Newport News Shipbuilding and Dry Dock Co.**, 16 BRBS 353 (1984); **Musgrove v. William E. Campbell Company**, 14 BRBS 762 (1982). A disability will be found to be manifest if it is "objectively determinable" from medical records kept by a hospital or treating physician. **Falcone v. General Dynamics Corp.**, 16 BRBS 202, 203 (1984). Prior to the compensable second injury, there must be a medically cognizable physical ailment. **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989);

Brogden v. Newport News Shipbuilding and Dry Dock Company, 16 BRBS 259 (1984); **Falcone**, **supra**.

The pre-existing permanent partial disability need not be economically disabling. **Director, OWCP v. Campbell Industries**, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), **cert. denied**, 459 U.S. 1104 (1983); **Equitable Equipment Company v. Hardy**, 558 F.2d 1192, 6 BRBS 666 (5th Cir. 1977); **Atlantic & Gulf Stevedores v. Director, OWCP**, 542 F.2d 602 (3d Cir. 1976).

Section 8(f) relief is not applicable where the permanent total disability is due **solely** to the second injury. In this regard, **see Director, OWCP (Bergeron) v. General Dynamics Corp.**, 982 F.2d 790, 26 BRBS 139 (CRT) (2d Cir. 1992); **Luccitelli v. General Dynamics Corp.**, 964 F.2d 1303, 26 BRBS 1 (CRT) (2d Cir. 1992); **CNA Insurance Company v. Legrow**, 935 F.2d 430, 24 BRBS 202 (CRT) (1st Cir. 1991). In addressing the contribution element of Section 8(f), the United States Court of Appeals for the Second Circuit, in whose jurisdiction the instant case arises, has specifically stated that the employer's burden of establishing that a claimant's subsequent injury alone would not have caused claimant's permanent total disability is not satisfied merely by showing that the pre-existing condition made the disability worse than it would have been with only the subsequent injury. **See Director, OWCP v. General Dynamics Corp. (Bergeron)**, **supra**.

On the basis of the totality of the record, I find and conclude that the Employer has satisfied these requirements. The record reflects (1) that Claimant has worked for the Employer between December 27, 1976 and June 18, 1996, (2) that his first shipyard accident occurred on March 31, 1980 when he injured his back while working on the 727 Boat, (3) that the Employer authorized treatment by Joseph J. Siciliano, Jr., D.C., and paid Claimant appropriate compensation while he was unable to work (RX 22), (4) that Claimant injured his right hip and leg while working on the 760 Boat on April 24, 1991 (RX 23), (5) that the Employer authorized treatment by Dr. Willetts and paid him appropriate compensation while he was unable to work (**Id.**), (6) that he reinjured his back on October 8, 1992, was unable to continue working, although experiencing low back pain, until December 24, 1992 (RX 26), was again treated by Dr. Siciliano and the Employer paid appropriate compensation while he was unable to work (RX 24), (7) that that injury resulted in back surgery on March 23, 1994 (RX 16), (8) that the doctor released Claimant to return to work on light duty with permanent restrictions, (9) that the Employer retained Claimant as a valued employee, provided appropriate modified work, kept him off the boats and gave him easier work assignments upon his return to work on November 21, 1994 (RX 13), (10) that Claimant was out of work for various periods of time thereafter (RX 26), (11) that Claimant’s repetitive

work activities between that day and June 16, 1996 aggravated, accelerated and exacerbated his weakened lumbar disc syndrome, thereby resulting in a new and discrete injury on June 16, 1996 and (12) that he has sustained previous work-related industrial accidents prior to June 16, 1996, (13) while working at the Employer's shipyard and (14) that Claimant's permanent total disability is the result of the combination of his pre-existing permanent partial disability and his June 16, 1996 injury as such pre-existing disability, in combination with the subsequent work injury, has contributed to a greater degree of permanent disability, according to Dr. Willetts (RX 5-RX 8) and Dr. Dubler. (RX 18) **See Atlantic & Gulf Stevedores v. Director, OWCP**, 542 F.2d 602, 4 BRBS 79 (3d Cir. 1976); **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989).

Claimant's condition, prior to his final injury on June 16, 1996, was the classic condition of a high-risk employee whom a cautious employer would neither have hired nor rehired nor retained in employment due to the increased likelihood that such an employee would sustain another occupational injury. **C & P Telephone Company v. Director, OWCP**, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977), **rev'g in part**, 4 BRBS 23 (1976); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Hallford v. Ingalls Shipbuilding**, 15 BRBS 112 (1982).

Even in cases where Section 8(f) is applicable, the Special Fund is not liable for medical benefits. **Barclift v. Newport News Shipbuilding & Dry Dock Co.**, 15 BRBS 418 (1983), **rev'd on other grounds sub nom. Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.**, 737 F.2d 1295 (4th Cir. 1984); **Scott v. Rowe Machine Works**, 9 BRBS 198 (1978); **Spencer v. Bethlehem Steel Corp.**, 7 BRBS 675 (1978).

The Board has held that an employer is entitled to interest, payable by the Special Fund, on monies paid in excess of its liability under Section 8(f). **Campbell v. Lykes Brothers Steamship Co., Inc.**, 15 BRBS 380 (1983); **Lewis v. American Marine Corp.**, 13 BRBS 637 (1981).

Attorney's Fee

Claimant's attorney, having successfully prosecuted this matter, is entitled to a fee assessed against the Employer. Claimant's attorney shall file a fee application concerning services rendered and costs incurred in representing Claimant after December 17, 1997, the date of the informal conference. Services rendered prior to this date should be submitted to the District Director for her consideration. A copy shall be sent to Employer’s counsel who shall then have fourteen (14) days to comment thereon.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore **ORDERED** that:

1. Commencing on June 19, 1996, and continuing thereafter for 104 weeks, the Employer as a self-insurer shall pay to the Claimant compensation benefits for his permanent total disability, plus the applicable annual adjustments provided in Section 10 of the Act, based upon an average weekly wage of $785.68, such compensation to be computed in accordance with Section 8(a) of the Act.

2. After the cessation of payments by the Employer, continuing benefits shall be paid, pursuant to Section 8(f) of the Act, from the Special Fund established in Section 44 of the Act until further Order.

3. The Employer shall receive credit for all amounts of compensation previously paid to the Claimant as a result of his June 16, 1996 injury on and after June 19, 1996. The Employer shall also receive a refund, with appropriate interest, of any overpayments of compensation made to Claimant herein.

4. Interest shall be paid by the Employer and Special Fund on any accrued benefits at the T-bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

5. The Employer shall furnish such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related injury referenced herein may require, even after the time period specified in the first Order provision above, subject to the provisions of Section 7 of the Act.

6. Claimant's attorney shall file, within thirty (30) days of receipt of this Decision and Order, a fully supported and fully itemized fee petition, sending a copy thereof to Employer's counsel who shall then have fourteen (14) days to comment thereon. This Court has jurisdiction over those services rendered and costs incurred after the informal conference on December 17, 1997.

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DAVID W. DI NARDI
Administrative Law Judge

Dated:
Boston, Massachusetts
DWD:ln